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No. 80-108

IN THE

Supreme Court of the United States

October Term, 1980

FIRST PENNSYLVANIA BANK N. A.,
Petitioner

v.

JAY A. ZEFFIRO and HARRY M. BERNARD, JR.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Counterstatement of Question Presented

Whether the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, by requiring certain provisions to be included in trust indentures and by explicitly granting jurisdiction to federal courts over all suits in equity and actions at law brought to enforce any liability or duty created by the Act, creates a private right of action, enforceable in the federal district courts, for breach by the indenture trustee of the statutorily mandated provisions.

Statutes Involved

In addition to the provisions of the Trust Indenture Act [the "Act"] set forth in First Pennsylvania's Appendix at A60-A83, the following statutory material is involved in this case and is reproduced in the Appendix to this brief at pages RA 1-RA 2:

1) Section 301 of the Act (15 U.S.C. §77aaa);

2) Section 309(d) and (e) of the Act (15 U.S.C. §77iii(d));

3) The entirety of Section 315 of the Act (15 U.S.C. §77ooo);

4) Section 319(c) of the Act (15 U.S.C. §77sss(c));

5) Section 322(b), 15 U.S.C. §77vvv(b); and

6) Section 22v(a) of the Securities Act of 1933 (15 U.S.C. §77v(a)).

Counterstatement of the Case

These consolidated class actions arise from the default in December, 1976 by Capital First Corporation ["Capital First"] in its obligations to several hundred debenture holders by failing to pay interest on its debentures issued in May, 1972. Plaintiffs, Jay A. Zeffiro and Harry M. Bernard, Jr.,[1] brought this consolidated class action on behalf of the debenture holders against the indenture trustee for the issue, Petitioner First Pennsylvania Bank, N.A. ["First Pennsylvania"]. First Pennsylvania allegedly failed, *inter alia*, to perform certain duties required by

[1] Plaintiff Isabella G. Smith withdrew as a class reprsentative for reasons of health. See 82 F.R.D. 31 (E.D.Pa. 1979).

provisions of the trust indenture which are mandated by the Trust Indenture Act of 1939, 15 U.S.C. §77aaa *et seq.* [the "Act"].[2]

These actions were brought in the United States District Court for the Eastern District of Pennsylvania pursuant to the Act, which provides for concurrent federal and state court jurisdiction over all suits in equity and actions at law brought to enforce any liability or duty the Act creates.[3]

First Pennsylvania moved to dismiss the complaints pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) alleging, *inter alia*, lack of subject matter jurisdiction and failure to state a federal claim under the Act. The District Court (Bechtle, J.) denied the motions to dismiss, finding express, and alternatively, implied causes of action, noting:

> . . . it is clear that the rights of debenture holders are articulated in the Act. The question before us is whether these rights give rise to liability 'created' by the Act within the meaning of the jurisdictional grant. While this would seem to be a question of

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[2] In particular, Plaintiffs allege, *inter alia*, that First Pensylvania violated the provisions of the indenture required by the following sections of the Act: §311, 15 U.S.C. §77kkk (A71-A76), in failing to account to the debenture holders for preferential collections received four months prior to default and thereafter; §315(a)(1), 15 U.S.C. §77ooo(a)(1) (RA 1), in failing to perform the duties specifically required by the debenture prior to default (such as obtaining collateral at six month intervals); and §315(c), 15 U.S.C. §77ooo(c) (A80), in allegedly failing to act prudently to protect the debenture holders after default. The allegations of the complaints are succinctly summarized in the opinions of the Courts below at A4 and A30-A31.

[3] Section 322 of the Act, 15 U.S.C. §77vvv(b) (A80); and Section 77v(a) of the Securities Act of 1933 (RA 5).

> pure statutory interpretation—i.e., defining the word 'created' as used in the jurisdictional grant—the parties urge the Court to employ the *Cort v. Ash* [422 U.S. 66 (1975)] implied-cause-of-action analysis. The Court will employ this implied-cause-of-action analysis, despite its doubts about its complete applicability, because the *Cort v. Ash* analysis is comprehensive and includes, by necessity, an examination of the statute's structure. (Footnote omitted). 473 F.Supp. at 207 (A40).

Thereafter, First Pennsylvania was permitted to take an interlocutory appeal to the Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(b) (A52-A53).

After an exhaustive analysis of the Act, its legislative history and the numerous recent implied cause of action cases decided by this Court, the Court of Appeals affirmed (A1-A28),[4] concluding:

> There is no need to weigh the *Cort* factors where they all indicate that a federal cause of action exists under the Act. *Cannon*, 441 U.S. at 709. The plaintiffs are members of the protected class, congressional intent indicates the availability of a federal forum, a federal cause of action is consistent with the Act and federal jurisdiction would not intrude on a matter of state concern. The language, purpose, and legislative history of the Act all indicate a congressional intent to allow private victims to sue in federal court for breach of mandated indenture terms. (Footnote omitted) (A24)

Accordingly, the Court of Appeals held that "the Trust Indenture Act provides injured debenture holders with a federal cause of action for breach of terms mandated by the Act." (A25). Thereafter, First Pennsylvania's Petition For Rehearing *En Banc* was denied (A58-A59).

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[4] The opinion, written by Judge Rosenn was joined by Judge Higginbotham. Senior District Judge Layton, sitting by designation, dissented.

Reasons for Denying the Writ

A. The Factors For Implying A Cause Of Action Are Well-Settled.

This case is yet another request for this Court to apply the well established standards as to when a private cause of action may be implied under a federal statute. See, *e.g.*, the landmark decision of *Cort v. Ash*, 422 U.S. 66, 78 (1975) which codified the factors to be analyzed in implied cause of action cases.

More recently, this Court has elaborated upon the *Cort* factors in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560 (1979); and, *Cannon v. University of Chicago*, 441 U.S. 677 (1979). These factors are now so clear that in *Kissinger v. Reporters Committee for Freedom of the Press*, ... U.S. ...., 100 S.Ct. 960 (March 3, 1980) this Court noted its disinclination to further elaborate upon them:

> This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here (Footnote omitted) *Id.* at 967-68.

This Court has given ample direction to the federal judiciary as to the factors relevant to uncovering congressional intent, and there is no reason to utilize this case as a vehicle to restate or refine the implied cause of action analysis.

B. The Court Of Appeals Decision Is Consistent With This Court's Prior Decisions And With The Decisions Of All Other Federal Courts.

The Court of Appeals thoroughly analyzed the Act, its legislative history, the relevant cases decided by this Court, and the decisions of all other Courts that have considered this issue, See *Morris v. Cantor,* 390 F.Supp. 817 (S.D.N.Y. 1975); *Matthews v. Fisher,* 1980-1 Fed.Sec.L.Rep. (CCH), §97,336 (S.D. Ohio 1978); and, *In re Equity Funding Corp. of America Securities Litigation,* 416 F.Supp. 160, 203 (D.C.Cal. 1976) *aff'd* 603 F.2d 1353 (9th Cir. 1979). The Court of Appeals concluded that a private cause of action may be implied under the Act.

In *Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416 (1972), this Court, in holding that a trustee in bankruptcy lacked standing to enforce the rights of debenture holders against the indenture trustee, reserved the question of whether the debenture holders themselves could sue in federal court under the Act. This Court, however, in *Caplin* suggested the possibility of a private cause of action by the debenture holders.[5] Further, that possibility had been characterized as "not unlikely" by Judge Friendly for the Court of Appeals for the Second Circuit sitting *en banc* when *Caplin* was before that Court, 439 F.2d 118, 123 n. 5 (2d Cir. 1971).

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[5] In *Caplin* this Court stated, 406 U.S. at 426, n. 17:

> We assume, *arguendo,* that violation of 15 U.S.C. §77ooo would give rise to a cause of action against an indenture trustee by debenture holders. If there is a cause of action, 15 U.S.C. §77vvv would seem to give federal courts jurisdiction. The Court of Appeals inferred that such suits would be proper, 439

(Footnote continued on following page)

Significantly, as noted above, the Court of Appeals decision in this case neither departs from established precedent nor conflicts with the decisions of this Court or any other court. Indeed, the holding below is virtually compelled by this Court's decision in *Cannon*, which stated that with *only one* exception this Court had *never* "refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case," 441 U.S. at 690, n. 13,[6] and where there is no expressed intent to deny a private cause of action.[7]

(Footnote continued from preceding page)

F.2d at 123, n. 5, but did not decide the point. Since we conclude that even if such suits may be brought, petitioner lacks standing to bring them, we do not decide the question.

This Court further stated:

Because the debenture holders could bring a class action and bind all members of the class, they can make a binding settlement and avoid lengthy and expensive litigation . . ." 406 U.S. at 432-33, n. 22.

This Court further stated:

Again, we assume, *arguendo*, that the Trust Indenture Act gives a right of action to debenture holders under these circumstances. Obviously, if the debenture holders themselves have no cause of action, their surrogate is in no better position. 406 U.S. at 433, n. 23.

The Court's reference in *Caplin* to F.R.Civ.P. 23 as a "powerful remedy" (*Id.* at 433) is further evidence that actions under the Act may properly be brought in federal court.

[6] The exception was *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which the relevant statute reflected a special policy against judicial intervention in Indian affairs.

[7] Thus, as this Court made clear in *Cannon*:

[I]n situations "in which it is clear that federal law had granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." (Footnote and citation omitted, emphasis in original) 441 U.S. at 694.

The conclusion that a private remedy was intended is further compelled because, as in *Cannon* the Act explicitly confers rights on the plaintiff class but lacks any provision for administrative enforcement. As noted in *Cannon*:

> [This Court] has *never* withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute (Emphasis added) 441 U.S. at 703 n. 41.

The restricted rights of the SEC under the Act, see §309(e), 15 U.S.C. §77iii(e) (RA 1), stand in marked contrast with the SEC's broad rights under the Investment Advisers Act, where no private right of action for damage was implied, *Lewis*, 444 U.S. at 20 ("§209 authorizes the Commission to bring civil actions in federal court [and] §203 to impose various administrative sanctions on persons who violate the Act . . . " Moreover, the legislative history of the Investment Advisers Act demonstrated a specific intention to omit a damage remedy by removing from early drafts of a bill language similar to that found in the Trust Indenture Act. *Lewis*, 444 U.S. at 21-22.[8]

First Pennsylvania erroneously suggests that the presence of an express civil remedy for violation of one section of the Act, §323 (15 U.S.C. §77www) (A81-A82), confirms that Congress did not intend to create any fur-

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[8] Compare and contrast the expansive language of Section 322 of the Act, referring to "*suits and actions brought to enforce any* liability," with the narrow language of the jurisdictional grant in §214 of the Investment Advisors Act, referring *only* to "suits in equity to enjoin violations."

ther private right of enforcement (Petition at p. 19). This Court rejected an identical argument in *Cannon*:

> The fact that other provisions of a complex statutory scheme create express remedies has *not* been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section ... Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent." ... unless there is other more convincing evidence that Congress meant to exclude the remedy (Citations omitted) (Emphasis in original) 441 U.S. at 711.

Thus, there is no conflict, as First Pennsylvania erroneously contends (Petition at pp. 15-21), between the ruling below and this Court's decisions in *Lewis* and *Touche Ross*, just as those decisions do not conflict with *Cannon*.[9] While *Cannon* found an implied cause of action under one statute, *Lewis* and *Touche Ross* found no implied cause of action for damages under other, different statutes.[10] In reality, First Pennsylvania is not requesting the Court to resolve a conflict, but is requesting the Court to overrule the unanimous view that a private federal cause of action exists under the Trust Indenture Act.

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[9] Conspicuous by its absence is any reference by First Pennsylvania to *Cannon*, where a private right of action was found under §901(a) of Title IX of the Education Amendments of 1972.

[10] The Court of Appeals succinctly distinguished *Touche Ross v. Reddington* on at least six grounds; and *Transamerica v. Lewis* on four grounds (A24-A25, fn 33).

C. The Court Of Appeals Correctly Decided This Case By Following Congressional Intent.

The Court of Appeals premised its decision on a detailed analysis of the Act and on this Court's recent implied causes of action cases. Because the Court of Appeals correctly applied *Cort v. Ash* and its progeny and correctly adduced legislative intent, there is no reason for this Court to review its decision.

As noted by the Court of Appeals, "[T]he *Cort* test is basically one of statutory construction" (A13), and in this connection the Act contains numerous indications that Congress intended to create a private federal cause of action to enforce the rights created by the Act. These factors are thoroughly discussed by the Court of Appeals (A13-A25).

Moreover, the Act expressly refers to possible liabilities of the trustee and to litigation to enforce rights. Section 315(a), 15 U.S.C. §77ooo(a) (RA 1), provides that the indenture trustee may not exempt itself from liability for failure to perform the duties specifically set out in the indenture, including those duties which the Act mandates the trustee to undertake. Section 315(d), 15 U.S.C. §77ooo(d) (RA 3), expressly prohibits the indenture trustee from relieving itself from liability for negligent and wilful misconduct. Section 319(c), 15 U.S.C. §77sss(c) (RA 4), provides that "No provision of this subchapter imposing any liability" [indicating that liability is imposed by the provisions other than §323] will apply to trustee conduct taken in good faith reliance on SEC rules, regulations or orders.

Section 323(a), 15 U.S.C. §77www(a) (A81), which expressly provides for civil liability for misrepresentation and omissions in statements to the SEC, is cited by First

Pennsylvania as being the only section creating civil liability enforceable in the federal courts. Yet §323(b), 15 U.S.C. §77www(b) (A82), provides that "[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that exist under the Securities Act of 1933 ... or otherwise at law ..." Reference to "this subchapter," meaning the entire Act,[11] as opposed to "this section," meaning Section 323, implies the existence of rights and remedies in other sections as well. Likewise, the "in addition to" clause recognizes that rights and remedies may arise under the Act without being explicitly set forth therein.

Thus, the existence of a cause of action in *some* court to enforce rights created by the Act, *vis-a-vis* the indenture trustee, is undeniable.

And, indeed, First Pennsylvania concedes that indenture provisions are enforceable in the courts of the various states, but erroneously argues that they are enforceable *only* in state courts in breach of contract and breach of trust actions.[12]

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[11] The word "subchapter" referred to in Section 322 is a term of art and refers to the entire Act. See, 15 U.S.C. §77aaa, RA 1.

[12] See Petition at 9 where First Pennsylvania argues:

> [The failure to expressly provide a federal right of action] reflects a conscious congressional choice to leave the injured debt security holder to his adequate and traditional state law remedies, now fortified by federal prohibition of exculpatory provisions relieving trustees of liability.

Similarly, as noted by the Court of Appeals (A8):

> First Pennsylvania argues that, because the Act only mandates certain terms of the indenture in order for it to be qualified by the SEC, the remedy is contractual under state law, and not one for federal jurisdiction.

However, the Act's express jurisdictional section makes clear that the liabilities and duties created by the Act are enforceable in both the federal and state courts. Section 322, 15 U.S.C. §77vvv (RA 5), provides in pertinent part:

> (b) Jurisdiction of offenses and violations under, and jurisdiction and venue of suits and actions brought to enforce any liability created by, this subchapter, or any rules or regulations or orders prescribed under the authority thereof, shall be as provided in section 77v(a) of this title (Emphasis added).

Section 77v(a) of the Securities Act of 1933, referred to in Section 322 quoted above, provides *inter alia*:

> *The district courts of the United States ... shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations,* promulgated by the Commission in respect thereto, and, *concurrent with State and Territorial courts,* of all suits in equity and actions at law brought to enforce any liability or duty *created by this subchapter* (Emphasis added).

Since a jurisdictional provision, like §322, "creates no cause of action of its own force and effect; it imposes no liabilities [and the] source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act", *Touche Ross,* 442 U.S. at 577. Here, liabilities and duties are found in the substantive provisions of the Act, as a matter of basic statutory construction. The Act "creates" liabilities and duties by mandating that specific liabilities and duties be incorporated in the indenture entered into by the indenture trustee for the benefit of the debenture holders. As noted by the District Court in *Zeffiro,* 473 F.Supp. at 209, (A45):

> [W]e find that the Act 'creates' liability for breach of the terms of an indenture in that those terms exist

> only because they are required by the Act. We find it manifestly clear that Congress 'brought those terms into existence' and do not find it relevant that the liability is 'indirectly' created by way of a contract claim.

In this case, as in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 19, n. 8, a construction of the Act that relegates plaintiffs to litigating in state court on purely state law grounds would be "anomalous", absent "some indication Congress in fact wished to remit the litigation of a federal right to a state court."

That federally created and enforceable rights can derive from congressionally mandated contractual provisions is not a new legal concept. See *American Surety Co. v. Schultz*, 237 U.S. 159 (1915), holding that a suit on a supersedeas bond required by federal law arises under a federal statute, and *International Assoc. of Machinists v. Central Airline, Inc.*, 372 U.S. 682 (1963), holding that an action to enforce the award of a board of adjustment established by a contract between an airline and union "arises under" federal law because Section 204 of the Railway Labor Act, 45 U.S.C. 184, required that such a board be created.[13] The language in *International Assoc. of Machinists* is particularly appropriate herein:

> The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a §201 contract is enforceable, it is because of congressional sanction: "[T]he federal

[13] Similar reasoning has led three Circuit Courts of Appeal to conclude that a private federal cause of action exists under §13(c) of the Urban Mass Transportation Act: *Local Div. 519, Etc. v. LaCrosse Mun. Transit U.*, 585 F.2d 1340, 1345-48 (7th Cir. 1978); *Div. 1287, etc. v. Kansas City Area Transp. Auth.*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) and *Div. No. 741, Etc. v. Greater Portland Transit District, Etc.*, 589 F.2d 1, 6-8 (1st Cir. 1978).

> statute is the source of the power and authority . . . The enactment of the federal statute . . . in the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimature of the federal law upon it. That is, the §204 contract, like the Labor Management Relations Act §301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. *Id.* at 692.

In short, as the Court of Appeals concluded in this case on the basis of its extensive statutory analysis, the Act gives every indication of a congressional intent to create federal rights for debenture holders and to provide a federal remedy in a federal forum for violation of those rights by breach of the terms of the federally regulated indenture.

D. The Court Of Appeals Decision Does Not Raise Administrative Or Federal-State Comity Issues That Merit Review By This Court.

First Pennsylvania attempts to raise the spector of a "nebulous and unlimited 'Federal Trust Law' " haunting increasing numbers of indenture trustees as economic conditions deteriorate (Petition at 11, 12-13). First Pennsylvania suggests that a flood of cases under the Act might overwhelm the federal judiciary (Petition at 9, 11, 12-14) and that the basic principles of federalism might erode as a result of a diversion from state to federal courts of indenture matters allegedly only of state concern (Petition at 14-15).

Whether any of those concerns is realistic is irrelevant in that not one of them provides any basis for reversing the decision of the Court of Appeals. Nor do they establish a basis for this Court's review.

The Court of Appeals found that the Act was intended "to attack a national problem in a uniform way" (A20). That finding is virtually unassailable in light of the legislative history of the Act. As recognized by the Court of Appeals (A20):

> A necessary means of facilitating the national uniformity goal of the Act would be through enforcement of the indenture in a federal forum. It is hard to believe that Congress would have established uniform standards to govern indentures and then paradoxically have allowed the application of those standards to depend on the law of the state of the suit. The interpretation of the indenture provisions mandated by the Act does not depend on ordinary contract principles—the intent of the parties—but depends on an interpretation of the legislation (Footnote omitted) (*Id.*)

The Court continued by referring to the clear congressional intent of obtaining uniformity in the interpretation of the Act, as follows (A20-A21):

> It would be contrary to the purposes of the Act to have the trustee held to certain standards in one state court and potentially different standards in another. Thus, federal court jurisdiction is necessary to achieve the uniform standards intended by the Act (Footnote omitted).

The achievement of the desired uniformity will only require the judicial interpretation of federal legislative standards by reference to state as well as federal law

precedents.[14] Judicial interpretation of federal legislative standards, however, has never been threatening to the federal courts. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (federal common law rights of nuisance recognized and applied to the pollution of interstate waters); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (federal labor law); and *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33 (1916) (Safety Appliance Act).

Moreover, reference to state law precedent as a tool for federal statutory interpretation is an accepted practice, which does not support a conclusion that only state, and not federal, rights are implicated by a statute. See generally Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 405 (1964) and Comment, *Rules of Decision in Non-diversity Cases*, 69 Yale L.J. 1428, 1434 (1960). With respect to the specific issues which might be raised under the Trust Indenture Act, the fact that certain statutory terms "might well receive different construction under the laws of the several states" (Petition at 11) is the very reason Congress believed it necessary that those standards be defined uniformly by the federal courts. While the federal judiciary might refer to state law concepts, not every state's interpretation need be taken into account. As

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[14] For instance, it might be necessary to develop on a case by case basis the "prudent man" standard required of a trustee after default under §315(c), 15 U.S.C. §77ooo(c) (A.80). Development of federal common law, however, is the method for filling in such statutory "interstices." See *Glus v. G. C. Murphy Co.*, ... F.2d .... (3d Cir. June 27, 1980) (Nos. 79-1507 and 1508) (Sloviter, J. dissenting):

> [F]ederal common law has been undertaken . . . where a federal statute provides both a cause of action and the rule of law but has left what has been denominated "interstices". Slip Opinion at 23.

noted by the drafters of the proposed ALI Federal Securities Code in the comments pertaining specifically to the development of a federal prudent man standard for indenture trustees by reference to state law precedent—"*Scott* [on Trusts] and the *Restatement of Trust* will continue to reign in any case!" ALI, Federal Securities Code Pt. XIII, Trust Indentures, §1305(c), Comment (4) (1980).

First Pennsylvania's fear that the federal courts will be flooded with Trust Indenture Act litigation as a result of this case is illusory. While investment in corporate bonds is admittedly a multi-billion dollar industry, past history suggests that courts will not be inundated with cases against indenture trustees.

A recent article in *The Business Lawyer,*[15] reports the results of a study on debentures by J. H. Hill, "Corporate Bond Research: Special Report XL" (Smith Barney, Harris Upham & Co., Inc. 1978), which indicates that defaults on publicly traded debt securities rarely occur. For the period 1966 through 1977 defaults on publicly distributed corporate bonds averaged less than fifteen one-hundredths of one percent (0.15 percent) of the principle of publicly issued corporate bonds outstanding.[16]

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[15] R. Smith, S. Case and F. Morison. "The Trust Indenture Act of 1939 Needs No Conflict of Interest Revision," *The Business Lawyer,* Vol. 35, p. 161 (Nov. 1979).

[16] Default was defined for purposes of the study as the missing of an interest or principal payment by the borrower. Annual default rates were calculated by contrasting the principal amount of defaulted bonds against the principal amount of total corporate bonds in good standing. See Hill Study p. 165, n. 13.

Furthermore, in the 40 years since passage of the Act, there have been a mere handful of cases filed in the state courts for breach of trust indentures. Moreover, even if this decision were reversed, litigation arising under trust indentures could and undoubtedly would end up in federal courts under diversity and pendent jurisdiction principles.

In short, where, as here, Congress intended the federal courts to enforce a federal statute, the courts have an obligation to fulfill that mandate. The alleged fear that federal courts will become embroiled in areas of law which might require analysis of state law principles to develop, and that they could be called on to handle large numbers of new cases, does not justify review of this case or reversal of the Court of Appeals.

Conclusion

The standards for implying a federal cause of action are well established and were strictly followed by the Court of Appeals. Moreover, this case has been correctly decided in accordance with congressional intent, and it follows the unanimous view of all other federal courts deciding this identical question.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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